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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT**

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

EVAN EDWARD HANN,

Defendant and Appellant.

C057839

(Super. Ct. No. 06F05380)

A jury convicted defendant Evan Edward Hann of two counts of second degree robbery. The trial court sentenced him to state prison for three years.

On appeal, defendant contends reversal of his convictions is required because (1) the prosecutor committed misconduct, and (2) the trial court abused its discretion by giving supplemental instructions to the jury, which was deadlocked, and directing it to continue deliberations without having first determined whether there was a reasonable probability that the jury could agree on a verdict. We shall affirm the judgment.

FACTS

On May 6, 2006, Jose Lopez and Israel Ramirez were walking to Ramirez's home when they were approached by two African-American males on bicycles, one of whom Lopez recognized as defendant from having previously seen him at Lopez's high school. Defendant was wearing a green basketball jersey that had a blue diagonal stripe and bore the number "3," as well as the name "Shareef Abdur-Rahim." Lopez and Ramirez crossed the street to avoid the two, but about two minutes later, they were again confronted by them.

Defendant got off his bike, pulled what appeared to be a gun from his waistband, racked it, and pointed it at Lopez and Ramirez. Defendant demanded and received several items from the two boys; then defendant and his companion fled. Lopez and Ramirez called 911.

On June 8, 2006, after the high school yearbooks had been distributed, Lopez found defendant's photograph and called the police. Lopez told Sacramento Police Officer Victor Lum that he had found defendant's photograph and was "one hundred percent sure" that defendant was one of the robbers. Lopez and Ramirez, each at different times, identified defendant from a photo lineup and again at trial.

On June 13, 2006, Detective Jeffrey Naff went to defendant's residence and spoke with defendant's mother, Deborah Hann. Naff told Hann that he had spoken with defendant about a green jersey with the name Shareef and the number three on it;

however, Naff had not spoken to defendant. Hann said that she knew of the green jersey, but did not know where it was or whether it belonged to defendant or one of his brothers. Mrs. Hann, who was called to testify by the prosecution, confirmed that defendant may have worn a green jersey, but she maintained that she could not recall anything else about it.

Defendant introduced the testimony of Dr. Mitchell Eisen, an expert on eyewitness identification. Dr. Eisen testified on various points of suggestiveness in making photographic identifications, including the time elapsed between the offense and the identification and whether a weapon was involved.

DISCUSSION

I

Defendant contends the prosecutor committed prejudicial misconduct by (1) arguing evidence outside the record; (2) telling the jury they should "act as representatives of the 'community' rather than as impartial individual judges of the facts"; and (3) eliciting testimony from Detective Naff revealing that defendant had a criminal history. There was no prejudicial misconduct.

The applicable federal and state standards regarding prosecutorial misconduct are well established. A prosecutor's behavior violates the federal Constitution when it is so egregious that it renders the trial with such unfairness that it constitutes a denial of due process. (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214.) Under California law, conduct by a prosecutor that does not render a trial unfair is nevertheless

misconduct if it involves the use of deceptive or reprehensible methods in an attempt to persuade the court or jury. (*People v. Espinoza* (1992) 3 Cal.4th 806, 820.) To preserve a claim of prosecutorial misconduct for review, the defendant must timely object and request an admonition, unless an admonition would be futile. (*People v. Samayoa* (1997) 15 Cal.4th 795, 841; *People v. Hill* (1998) 17 Cal.4th 800, 820.)

A

Evidence outside the Record

Defendant refers to the following argument by the prosecutor: "[I]f you listen to the to the 911 tape, you listen to [Lopez's] testimony, he remembers the defendant wearing . . . [a] Shareef Abdur-Rahim jersey with the number three and a blue stripe. [¶] And I'm sure we have some Kings fans in the audience. Everybody knows the Kings' colors are not purple -- or not green with a blue stripe. Everybody knows the Kings' colors are purple and white or maybe gold, that strange uniform that they had come out with last year. [¶] So what does that mean for us? [¶] Well, that means that this jersey is somewhat unique. Of course we all know that you can get a San Francisco Giants hat that's, like, pink and purple. But the fact of the matter is these [are] different kinds of sports memorabilia, this is not a standard Kings jersey." At this point, defendant objected that the prosecutor was "arguing facts outside the record, not subject to common knowledge." The court overruled the objection, finding it "fair argument."

Defendant contends the trial court prejudicially erred in overruling his objection. He argues that since there was no evidence in the record regarding "what constituted a 'standard-issue Sacramento Kings Jersey' or what that team's colors were," and because the team colors are not a matter of common knowledge, the challenged evidence was outside the record. Defendant was prejudiced, he contends, because admission of this evidence permitted the prosecutor to argue the uniqueness of the green jersey to corroborate Lopez's eyewitness identification of defendant as one of the robbers, which was the critical issue in the case. The People respond that the Kings' colors are a matter of common knowledge, and, therefore, the trial court properly overruled defendant's objection. We conclude defendant suffered no prejudice from the ruling.

It is misconduct under both state and federal law for a prosecutor to argue evidence outside the record. (*People v. Fry* (1998) 18 Cal.4th 894, 976; *People v. Gaines* (1997) 54 Cal.App.4th 821, 825.) However, "[A] prosecutor is given wide latitude during argument. . . . It is . . . clear that counsel during summation may state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history or literature.'" (*People v. Wharton* (1991) 53 Cal.3d 522, 567.)

The People contend the Kings' colors are a matter of common knowledge because the Kings are a major professional sports franchise, they have been located in Sacramento for many years, they are featured in local magazines and various periodicals,

their team products are in local stores, and they appear quite frequently on television, both in advertisements and games.

The People may well be correct; however, their position is at odds with the prosecutor's description. The official colors of the Sacramento Kings are black, silver, and purple, not "purple and white, or maybe gold."¹ We need not determine whether the Kings' team colors are a matter of common knowledge, however, because even assuming the court erred as claimed, defendant was not prejudiced.

Even without the reference to the official Kings' colors, the People would still have been able to argue the uniqueness of the green jersey. Lopez testified that defendant was wearing a green jersey with a blue stripe, bearing the number "3" and the name "Shareef Abdur-Rahim." Detective Naff testified that when he asked defendant's mother about the green jersey with the name Shareef and the number "3" on it, she said that she was familiar with the jersey he was talking about, but did not know where it was or whether it belonged to defendant or possibly to one of his brothers. Thus, even though the People would not have been able to argue that the green jersey was unique because it was not in the official Kings' colors, they still could argue that the jersey was unique because it bore a specific name and number. Admittedly, the prosecutor's argument would not have been quite as strong without his reference to the green jersey

¹ See http://en.wikipedia.org/wiki/Sacramento_Kings.

not being standard. Nevertheless, the argument was essentially the same because the fact that the robber was wearing a green jersey with the name Shareef Abdur-Rahim and the number 3 on it and the fact that defendant, who had been identified as one of the robbers, also had such a jersey, qualify as highly unusual and probative circumstances. Consequently, the trial court's ruling had no effect on the verdict.

B

Prosecutor's Statement Regarding Jurors Being Members of the Community

Defendant also assigns as misconduct the following comments by the prosecutor to the jury: "You are members of this community that are getting the justice from this verdict no matter what it is. You get the justice that you give here because you are all members of this community. [¶] . . . It's the justice that comes out of this case that will be for you and for the rest of this community." Later, the prosecutor added, "I'm asking you to do some justice in this community."

According to defendant, these comments were misconduct because they informed "the jurors that they should act as representatives of the 'community' rather than as impartial individual judges of the facts."

We reject the claim for two reasons. First, since defendant failed to object and request an admonition when an admonition could have cured the arguable error, he has forfeited the issue for appeal. (*People v. Williams* (1997) 16 Cal.4th 153, 220-221 (*Williams*) [failure to object and

request admonition forfeits issue where such could have cured any error].)

Second, the comments do not constitute misconduct. "One function of a jury is to represent the community." (*People v. Jones* (1997) 15 Cal.4th 119, 186, overruled on another point in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) Here, the jurors were expressly instructed that they "must follow the law" as explained by the court even if they found the court's explanation in conflict with that given by the court, and that "[e]ach of you must decide the case for yourself, but only after you have discussed the evidence with the other jurors" and that no juror was to change his or her mind simply because other jurors were in disagreement with him or her. These instructions, which were presumably followed by the jurors (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 83), assured that the jurors would act individually as impartial judges of the facts, and nothing in the record suggests they acted differently.

Defendant contends that the record shows that the prosecutor's "community-conscience argument may have actually resulted in some jurors being unwilling to follow the court's instructions." The purported basis for this showing is the following: During deliberations, the jury sent the court a note asking, "In the event that your instructions are not being followed, what shall we do?" After consultation with counsel, the court responded in writing, "Please explain how you believe my instructions are not being followed."

Claiming that there is nothing in the record showing the court "definitively" resolved the jury's question, defendant infers that "a reasonable possibility exists that at the time the verdict was reached, there were jurors who covertly were continuing to fail to follow the court's instructions." The argument is considerably less than convincing.

"An inference is not reasonable if it is based only on speculation." (*People v. Holt* (1997) 15 Cal.4th 619, 669.) Since defendant expressly admits that the foregoing inference is "speculative," the inference is not reasonable and therefore cannot be the basis for reversal of his convictions.

C

Prosecutor's Elicitation of Evidence Showing Defendant had a Criminal Background

During the direct examination of Detective Naff, the following exchange occurred: "Q. And you also mentioned a photo lineup. [¶] How did you compile and create this photo lineup? [¶] A. We have a database that's available to us of photographs, and I used that system to generate the lineup. [¶] Q. Were you able to locate a photograph from [defendant]? [¶] A. Yes, I was. Q. Did you put that in the lineup? [¶] A. Yes, I did. [¶] Q. Okay. And how many pictures were in this lineup? [¶] A. There's a total of six. [¶] Q. How did you select the other five people to go into the lineup? [¶] A. The way the system works is when we enter an individual, his or her information into the system, it will locate that individual which, in this case, was a county number that was assigned to

the defendant. [¶] Once I enter that information, you can ask the computer to find similars. When you choose find [sic] similars, they come up in the system with six at a time, and then you can choose from those photographs to enter into the lineup. [¶] Q. Okay. And in this case, is that what you did? [¶] A. Yes."

Defendant contends that the foregoing exchange constituted prosecutorial misconduct because it violated the trial court's pretrial ruling that the jury not be informed that the photograph of defendant used in the lineup was obtained from the system database, thereby impliedly informing the jury that he had a criminal history.

Again, defendant's failure to object to the questioning, to assign misconduct to the prosecutor and to request an admonition which, in this case could have cured any potential error, forfeits the issue for appeal. (*Williams, supra*, 16 Cal.4th at pp. 220-221.)

Nor did the prosecutor commit misconduct. The exchange does not show that defendant's photograph was obtained from the criminal database system. Instead, it shows that a photograph was obtained "from" defendant, that defendant's photo was placed in the system, and that the system provided six additional photographs for the officer to choose from for the lineup. Since the source of defendant's photograph was never disclosed, the prosecutor did not violate the trial court's pretrial order and, therefore, no misconduct occurred.

II

Defendant contends the trial court abused its discretion when it directed the jury to continue deliberating without determining whether there was "'no reasonable probability that the jury [could] agree'" on a verdict. We reject the claim.

Penal Code section 1140 provides: "Except as provided by law, the jury cannot be discharged after the cause is submitted to them . . . unless by consent of both parties . . . or unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree."

"The determination, pursuant to [Penal Code] section 1140, whether there is a "'reasonable probability'" of agreement, rests within the sound discretion of the trial court.

[Citation.] Although the court must take care to exercise its power without coercing the jury into abdicating its independent judgment in favor of considerations of compromise and expediency [citation], the court may direct further deliberations upon *its reasonable conclusion that such direction would be perceived "as a means of enabling the jurors to enhance their understanding of the case rather than as mere pressure to reach a verdict on the basis of matters already discussed and considered."* [Citation.]" (People v. Proctor (1992) 4 Cal.4th 499, 539, italics added.)

Here, witness testimony commenced on Wednesday, July 18, 2007, and jury deliberations began on Tuesday, July 24. During the afternoon of Friday, July 27, the jury reported being

deadlocked. The court recalled the jury and informed them as follows: "I know you have been deliberating for a couple of days, but I also know that you have spent a considerable amount of time listening to readback. [¶] So that's why I'm giving you these further instructions. It has been my experience on more than one occasion that a jury, which initially reported that it was unable to reach a verdict was ultimately able to arrive at verdicts on one or more of the counts before it." The court then gave the supplemental instruction approved by this court in *People v. Moore* (2002) 96 Cal.App.4th 1105, 1118-1120, 1122 (*Moore*), which, as given in this case, we set forth in the margin.²

² "Your goal as jurors should be to reach a fair and impartial verdict if you are able to do so based solely on the evidence presented and without regard for the consequences of your verdict regardless of how long it takes to do so. [¶] It is your duty as jurors to carefully consider, weigh and evaluate all of the evidence presented at the trial, and to discuss your views regarding the evidence and to listen to and consider the views of your fellow jurors. [¶] In the course of your further deliberations, you should not hesitate to reexamine your own views or request your fellow jurors to reexamine theirs. You should not hesitate to change your view you once held if you are convinced it is wrong or to suggest other jurors change their views if you are convinced that they are wrong. [¶] Fair and effective jury deliberations require a frank and forthright exchange of views. As I previously instructed you, each of you must decide the case for yourself. And you should do so only after a full and complete consideration of all of the evidence with your fellow jurors. [¶] It is your duty to -- as jurors to deliberate with the goal of arriving at a verdict on the charges if you can do so without violence to your own individual judgment. [¶] Both the People and the defendant are entitled to the individual judgment of each juror. As I previously instructed you, you have the absolute discretion to conduct

your deliberations in any way you deem appropriate. [¶] I'm going to suggest that since you have not been able to arrive at a verdict using the methods that you have chosen so far, that you consider to change the methods that you've been following, at least temporarily, and try some new methods. [¶] For example, you may wish to consider having different jurors lead the discussions for a period of time or you may wish to experiment with reverse role playing by having those on one side of an issue present an argument on the other side's position and vice versa. This might enable you to better understand the other's positions. [¶] And by suggesting that you should consider changes in your methods of deliberations, I want to stress, I am not dictating or instructing you as to how to conduct your deliberations. I merely find you may find it productive to do whatever is necessary to ensure that each juror has a full and fair opportunity to express his or her views and consider and understand the views of the other jurors. [¶] I also suggest that you reread jury instruction number 200 (informing jury how it should view the instructions) and 3550 (suggesting how the jury should prepare for deliberations), that's the first instruction and the last instruction. [¶] These are instructions pertaining to your duties as jurors and mak[ing] recommendations on how you should deliberate. The integrity of a trial requires that jurors at all times during their deliberations conduct themselves as required by the instructions. [¶] Instruction number[s] 200 and 3550 define the duties of a juror. The decision the jury renders must be based on the facts and the law. You must determine what facts have been proved from the evidence received in the trial and not from any other source. [¶] A fact is something proved by the evidence -- by the evidence, period. [¶] Second, you must apply the law that I state to you, to the facts as you determine them and in this way arrive at your verdict. [¶] You must accept and follow the law as I state it to you regardless of whether you agree with the law. If anything concerning the law said by the attorneys in their arguments or any other time during the trial conflicts with my instructions on the law, you must follow my instructions. [¶] Instruction number 3550 defines the jurors' duty to deliberate, the decisions that you make in this case must be based on the evidence received in the trial and the instructions given by the court. [¶] These are the matters this instruction requires you to discuss for the purpose of reaching a verdict. Instruction number 3550 also recommends how jurors should approach their task. [¶] You should keep in mind the recommendations this instruction

Citing *People v. Howard* (2008) 42 Cal.4th 1000 (*Howard*), *People v. Sheldon* (1989) 48 Cal.3d 935 (*Sheldon*), *People v. Gainer* (1977) 19 Cal.3d 835 (*Gainer*), *People v. Whaley* (2007) 152 Cal.App.4th 968 (*Whaley*), *Lowenfield v. Phelps* (1988) 484 U.S. 231 [98 L.Ed.2d 568] (*Lowenfield*), and *Moore, supra*, 96 Cal.App.4th 1105, defendant maintains that "[c]ase law has, thus, recognized that a court's exercise of discretion will be upheld where its determin[ation] that there is a reasonable probability of agreement by the jury is based on information obtained from the jury or premised on the short duration of pre-deadlock deliberations." Therefore, defendant concludes, since the court did not query the jury to ascertain whether there was a reasonable probability they could agree, and the deliberations were not brief, the court abused its discretion in ordering them to continue deliberating. We disagree.

The cases cited by defendant are of no aid to him. While each case sets forth the court's inquiry of the jury as to whether there is a reasonable probability that further deliberations would aid them in reaching a verdict, no case purports to set a minimum inquiry of what the court must specifically do in making that determination. (See *Howard*,

suggests when considering the additional instructions, comments, and suggestions that I have just made in the instructions now -- that I'm now giving you. And I do hope that my comments and suggestions may have -- may be of some assistance to you. [¶] I am going to order that you continue your deliberations at this time. If you do have other questions or concerns or requests or any communications that you desire to report to me, please put those in writing on the form that has been provided to you."

supra, 42 Cal.4th at pp. 1028-1031; *Sheldon, supra*, 48 Cal.3d at pp. 958-960; *Gainer, supra*, 19 Cal.3d at pp. 842-843; *Whaley, supra*, 152 Cal.App.4th at pp. 978-985; *Lowenfield, supra*, 484 U.S. at p. 238; *Moore, supra*, 96 Cal.App.3d at pp. 1118-1123.) All that is required is for the court, "in the exercise of its discretion," to find a "'reasonable probability'" that they will reach agreement. (*Howard, supra*, 42 Cal.4th at p. 1029.)

Defendant contends that the court's finding of a reasonable probability that further deliberations would be beneficial is not supported by the record. Defendant calculates that from the inception of deliberations to the time of the reported deadlock (allowing for lunches), there were three hours 59 minutes of requested reading of testimony and 13 hours 16 minutes of deliberation time. Thus, he concludes, the deliberations were "lengthy," the court's calling upon its prior experience with prior deadlocked juries was "speculative," and the court's failure to inquire whether further instruction would be of assistance shows "an abuse of discretion." The argument is not persuasive.

Prior to the jury's informing the court that it was deadlocked, the jury had sent the court a note requesting guidance on what it should do "[i]n the event that your instructions are not being followed." Additionally, the court had available to it the recently approved *Moore* instruction, which not only amplifies on the manner in which the jurors should conduct their deliberations, but also suggests that they

may better understand their own position as well as those of the other jurors by having different jurors lead the discussions or by "role playing," i.e., arguing the opposition's sides instead of just their own. Thus, the court could reasonably have concluded the Moore instruction might assist the jury in following its instruction and coming to a unanimous decision.

Finally, as to defendant's claim that the court's reliance on its past dealings with deadlocked juries was "speculative" when applied to the instant case, it has been noted that "Every finder of fact, in forming his conclusions, necessarily takes into consideration his background of experience in life. This is true of jurors and it is true of a court functioning as a finder of fact." (*Estate of Wynne* (1966) 239 Cal.App.2d 369, 375.)

Consequently, we find no abuse of discretion by the court in order further jury deliberations.

DISPOSITION

The judgment is affirmed.

We concur: _____ DAVIS, J.*

_____ BLEASE, Acting P. J.

_____ HULL, J.

* Retired Associate Justice of the Court of Appeal, Third Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.